



**United States of America  
Federal Trade Commission**

**Hey, I've Seen This One:  
Warnings for Competition Rulemaking at the FTC**

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As they said in the film *Back to the Future*, "Where we're going, we don't need roads."

~ Ronald Reagan, Address Before a Joint Session of Congress  
on the State of the Union, February 4, 1986

Thank you to the Federalist Society for organizing today's event and for inviting me to speak. I fear that we will soon be facing an onslaught of competition rulemaking, so this discussion is an important and timely one. Before I begin, I must give the standard disclaimer that the views I share today are my own and do not reflect the views of the FTC or of any other Commissioner.

It is no secret that Ronald Reagan led a push for deregulation. What might surprise some of you is that Ronald Reagan loved the movie *Back to the Future* and even quoted it in his 1986 State of the Union.<sup>1</sup> In *Back to the Future*, Marty McFly jumps back in time from 1985 to 1955. In one scene from 1955, a "new" episode of *The Honeymooners* comes on TV and Marty, with the benefit of 30 years of TV history, blurts out: "Hey, I've seen this one ... it's a classic." With that characteristic twinkle in his eye, I think President Reagan would use the same line in response to modern calls for increased rulemaking and regulation.

Many commentators, academics, members of Congress, and even some enforcers are advocating for competition rulemaking. This push is fueled by a false narrative that antitrust enforcement has decreased<sup>2</sup> and that the antitrust laws are weak.<sup>3</sup> These claims have intentions outside of protecting consumers<sup>4</sup> and are based on erroneous data that has been largely

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<sup>1</sup> Chris Chase, *30 'Back to the Future' Facts That'll Make You Say 'Great Scott!'*, USA TODAY (Oct. 21, 2015), <https://ftw.usatoday.com/2015/10/back-to-the-future-facts-about-trilogy-future-day-eric-stoltz-video-trivia-marty-mcfly-spielberg-zemeckis> ("Ronald Reagan loved the film, especially when 1955 Doc was in disbelief that Reagan was the president in Marty's 1985. 'The actor? Who's the vice president? Jerry Lewis? I suppose Jane Wyman's [Reagans' first wife] is first lady!' He evidently laughed so hard that the projectionist had to rewind the film because Reagan wanted to see it again. Later, in his 1986 State of the Union, Reagan quoted the final line from the first film — 'roads, where we're going, we don't need roads.'").

<sup>2</sup> THE COURAGE TO LEARN, AMERICAN ECONOMIC LIBERTIES PROJECT 9-10 (Jan. 2021), <https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn-Final.pdf> ("Accurately diagnosing the causes of America's current monopoly crisis is critical to successfully addressing it. The crisis did not emerge in the Trump years ... the problem stems from decisions by policymakers from both parties spanning multiple administrations. The crisis is the result of a specific ideology that both Republican and Democratic antitrust enforcers have instrumentalized over multiple decades. ... This record is not unique to Obama's administration; wealth and power concentrated under the Reagan, George H.W. Bush, Clinton, and George W. Bush administrations as well. Ultimately, today's crisis of concentrated power is the culmination of 40 years of a specific interpretation of antitrust and competition doctrine.") (citations omitted).

<sup>3</sup> See, e.g., MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116<sup>th</sup> CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 7 (2020), [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf). ("[W]e firmly believe that the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform").

<sup>4</sup> See, e.g., Tim Wu, Opinion, *That Flour You Bought Could Be the Future of the U.S. Economy*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/opinion/us-grain-industry.html> (criticizing an economic model that makes production as cheap as possible and keeps prices low).

debunked.<sup>5</sup> Perhaps most notably, these proponents of rulemaking ignore the lessons learned from past regulatory failures.<sup>6</sup>

I do not have Doc Brown's DeLorean like Marty McFly, so I cannot go back and save regulators from their own mistakes. But we have seen this show before, and I will do what I can to prevent America from traveling down the same path of harmful regulation and rulemaking that we have witnessed in the past.

Of course, I support transparency and I understand that companies seek guidance on where the boundaries of legality are drawn. And clear guidance that helps companies avoid violating antitrust laws in the first place can benefit consumers. But we do not need rules to achieve these goals – guidelines and other forms of transparency can achieve the same benefits without inflicting the significant costs that come with rulemaking.

I would like to turn now to that topic. Based on lessons from past mistakes in regulation and rulemaking, I am going to highlight seven considerations that should be top-of-mind in analyzing competition rules going forward.

## **1. Competition Rulemaking Will Hinder the Rational Development and Refinement of Economic and Legal Analysis**

Critics of the existing antitrust framework want to use rulemaking to rely less on effects-based analysis and more on bright-line rules that have been rejected for over 40 years. Former FTC Chairman William Kovacic notes that modern antitrust law cannot be assessed “without accounting for the doubts that courts in the 1970s and 1980s had expressed about the institutional

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<sup>5</sup> See, e.g., Joshua D. Wright, *Background Material for the Hearing on Market Concentration* 9 (Organization for Economic Cooperation and Development, DAF/COMP/WD(2018)69 (June 7, 2018) , [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf) (“Unlike broadly defined industries ... antitrust product and geographic markets are often narrowly or locally defined. ... Absent a well-defined market, market share statistics are largely meaningless for the purpose of measuring competitive intensity and certainly not appropriate for inferences about the intensity of competition across industries.”). See also Statement of Comm’r Christine S. Wilson at 1-3, *In re Staples, Inc./Essendant, Inc.*, File No. 181-0180 (Jan. 28, 2019) [https://www.ftc.gov/system/files/documents/public\\_statements/1448307/181\\_0180\\_staples\\_essendant\\_wilson\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448307/181_0180_staples_essendant_wilson_statement.pdf); Michael Vita & F. David Osinski, *John Kwoka’s Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361 (2018); Gregory J. Werden & Luke M. Froeb, *Don’t Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST, Fall 2018, at 74.

<sup>6</sup> Dissenting Statement of Commissioner Christine S. Wilson Open Commission Meeting on July 1, 2021 (July 1, 2021) at 6-7, [https://www.ftc.gov/system/files/documents/public\\_statements/1591554/p210100wilsoncommnmeetingdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf) (“One striking example of this disregard for history can be found in the House Judiciary Committee’s Majority Staff Report, which 12 different times points to railroad regulation as a model for Big Tech. In a stunning omission, nowhere in its 450 pages or 2,500 footnotes does the report mention the fact of the bipartisan repeal of this regulatory framework because it harmed consumers and stifled innovation; neither does it mention the benefits that came from deregulation. There are many at the FTC who lived through the 1970s and 1980s and experienced the public and Congressional backlash during those dark days of the agency’s history. There are many others who worked with and learned from those who lived through that period. Current management would be wise to seek their guidance.”).

capability” of the agencies.<sup>7</sup> In 1977, the Supreme Court held in *Continental v. Sylvania* that per se rules are “appropriate only when they relate to conduct that is manifestly anticompetitive[.]”<sup>8</sup> The Court also stated that “a departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... formalistic line drawing.”<sup>9</sup>

Judicial rejection of an approach that relies solely on presumptions was perhaps most famously expressed in the D.C. Circuit’s *Baker Hughes* decision.<sup>10</sup> Then-Judge Clarence Thomas—joined by then-Judge Ruth Bader Ginsburg—admonished the DOJ for failing to “maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery.”<sup>11</sup>

Competition rulemaking will almost certainly diminish the effects-based analysis built through more than four decades of careful assessment. It is now generally accepted that antitrust laws require a fact-specific inquiry that can adapt as industries evolve and economic analysis advances.<sup>12</sup> Improved economic analysis led to the reassessment of per se bans on many vertical restraints<sup>13</sup> and altered merger enforcement.<sup>14</sup> But competition rulemaking will freeze the legal and economic analysis of any conduct subject to a rule. This approach is not compatible with today’s fact-specific and evolving approach to antitrust law.

## 2. The Procedural Difficulty in Creating Rules Makes it Impossible to Stay Up-to-Date

We’ve talked about how rulemaking freezes legal and economic analysis. Unfortunately, rulemaking relies on a one-time snapshot of industry dynamics. But industry dynamics change and evolve, while the rulemaking process is lengthy and cumbersome. For example, amendments

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<sup>7</sup> William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 398-99 (2003), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/modern-evolution-u.s.competition-policy-enforcement-norms/0304modernevolution.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/modern-evolution-u.s.competition-policy-enforcement-norms/0304modernevolution.pdf).

<sup>8</sup> *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977).

<sup>9</sup> *Id.* at 58-59.

<sup>10</sup> 908 F.2d 981 (D.C. Cir. 1990)

<sup>11</sup> *Id.* at 992 n.13. The future Justices also quoted *United States v. Syufy Enters.*, 903 F.2d 659, 672 (9th Cir.1990) (“It is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend limited taxpayer resources.”).

<sup>12</sup> *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2412-13 (2015) (recognizing the “dynamic potential” of the antitrust laws and the flexibility to “revise our legal analysis as economic understanding evolves and ... to reverse antitrust precedents that misperceived a practice’s competitive consequences[.]”). *See also* *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (describing Supreme Court’s distinctive role under antitrust statutes “in recognizing and adapting to changed circumstances and the lessons of accumulated experience.”).

<sup>13</sup> *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 15-18 (1997) (reviewing how “a considerable body of scholarship discussing the effects of vertical restraints” influenced judicial reassessment of the per se ban on maximum resale price maintenance).

<sup>14</sup> Timothy J. Muris, *GTE Sylvania and the Empirical Foundations of Antitrust*, 68 ANTITRUST L.J. 899, 903-07 (2001) (describing impact of developments in industrial organization economics on federal merger enforcement policy).

to the Contact Lens Rule took more than five years to complete.<sup>15</sup> And this rule is not an outlier – one study found that the FTC takes more than five years on average to formulate a consumer protection rule.<sup>16</sup> Although modern FTC consumer protection rules follow a procedure with some differences from the Administrative Procedure Act, examples of rulemaking in other agencies show a similarly slow process.<sup>17</sup> All the while, business practices are changing, new competitors are emerging, and consumer preferences are shifting. How can a cumbersome rulemaking accurately reflect this dynamism?

Some proponents of rulemaking distract from arguments about the speed and rigidity of rules by highlighting merger guidelines.<sup>18</sup> But merger guidelines are not an accurate representation of competition rulemaking. First, creating transparency through guidelines (e.g., explaining how agencies investigate and analyze matters) does not establish bright-line rules that reject a harms-based and fact-specific analysis. As discussed above, we should not return to a method of antitrust enforcement that has been rejected for decades.<sup>19</sup>

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<sup>15</sup> Contact Lens Rule: Supplemental notice of proposed rulemaking, 84 Fed. Reg. 24,664, 24,666-67 (May 28, 2019) (“The comment period closed on October 26, 2015. ... After a review of comments, surveys, other submitted information, and its own enforcement experience, the Commission determined that the overall weight of the evidence demonstrated need to improve compliance with the Rule’s automatic prescription-release requirement, as well as a need to create a mechanism for monitoring and enforcing the Rule. ... The NPRM sought comment on this proposal, and also about the following issues: The provision of additional copies of prescriptions, the amount of time for a prescriber to respond to such a request, the use of patient portals to release prescriptions, and potential modifications to address concerns about automated telephone verification calls. The sixty-day comment period for the Commission’s NPRM closed on January 30, 2017. ... To obtain additional input and more fully consider commenter concerns, the Commission solicited additional comments and held a public workshop on the Contact Lens Rule and the Evolving Contact Lens Marketplace on March 7, 2018. ... After reviewing the comments, the Commission now proposes to modify its prior proposal—put forth in the NPRM—that would have required prescribers to request a signed statement from their patients acknowledging receipt of the patient’s prescription.”); Contact Lens Rule: Final Rule, 85 Fed. Reg. 50,668 (Aug. 17, 2020) (“The FTC is publishing a final rule to implement amendments to the Contact Lens Rule. ... This rule is effective October 16, 2020.”).

<sup>16</sup> Jeffrey S. Lubbers, *It’s Time to Remove the ‘Mossified’ Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979 (2015), [https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch\\_lawrev](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch_lawrev).

<sup>17</sup> For example, the National Advisory Committee on Occupational Safety and Health noted that it takes the Occupational Safety and Health Administration (OSHA) within the Department of Labor an average of 10 years to develop and promulgate a health or safety standard. NATIONAL ADVISORY COMMITTEE ON OCCUPATIONAL SAFETY AND HEALTH, REPORT AND RECOMMENDATIONS RELATED TO OSHA’S STANDARDS DEVELOPMENT PROCESS (2000), [https://www.osha.gov/advisorycommittee/nacosh\\_report\\_06062000](https://www.osha.gov/advisorycommittee/nacosh_report_06062000).

<sup>18</sup> Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 366-67 (2020), [https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan\\_Rulemaking\\_87UCLR357.pdf](https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf) (“‘Rulemaking’ often evokes the idea of government imposing some inflexible prescription upon the marketplace. This is not what we are suggesting. As former Commissioner Elman rightly noted, rulemaking can also be related to ‘standards, guidelines, pointers, criteria, or presumptions.’ Rules come from courts, legislative bodies, and agencies. While they were not promulgated as agency rules, certain elements of the merger guidelines eventually came to serve as rules once courts adopted them. The merger guidelines stipulate the analytical framework that the agencies rely on to enforce the merger law. Agency rulemaking could do the same for ‘unfair methods of competition.’”).

<sup>19</sup> See *supra* text accompanying notes 7-14.

Second, yes, it took a relatively short period to draft and finalize our new vertical merger guidelines. Draft vertical merger guidelines were announced and released on January 10, 2020.<sup>20</sup> After workshops and a short extension of the comment period, the final guidelines were released only six months later in June 2020.<sup>21</sup> So the process of creating guidelines, unlike formal rulemaking, can be completed quickly. But these guidelines also provide a cautionary tale of agency inaction. The old version was issued in 1984, and there had been broad consensus for many years that they required an update.<sup>22</sup> In fact, in an interview after his tenure as FTC Chairman ended, Bob Pitofsky said that his guiding principle in deciding whether to challenge a vertical merger was to ignore the vertical merger guidelines.<sup>23</sup> While the FTC and courts can disregard outdated guidelines, bright-line rules are difficult to ignore.

### 3. Competition Rulemaking Ignores Past Historical Regulation Mistakes

History provides repeated failures to regulate competition. The Civil Aeronautics Board (CAB) and the Interstate Commerce Commission (ICC) provide examples of past failures in competition regulation. A Senate subcommittee lead by Ted Kennedy in 1975 found that the CAB failed to bring about the low-fare service that was technically feasible at the time and that consumers certainly sought.<sup>24</sup> Railroad regulation fared no better. A study of the ICC estimated that it cost consumers at least \$500 million per year (in 1960s dollars).<sup>25</sup>

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<sup>20</sup> Press Release, Fed. Trade Comm'n, FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment (Jan. 10, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment>.

<sup>21</sup> Press Release, Fed. Trade Comm'n, FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers (June 30, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers>.

<sup>22</sup> Press Release, Fed. Trade Comm'n, FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment (Jan. 10, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment> (“Many comments received from the FTC’s Hearings on Competition and Consumer Protection in the 21st Century called for additional and updated guidance on analysis of vertical mergers, as have reports from the American Bar Association’s Antitrust Section and the Antitrust Modernization Commission.”). See also Rohit Chopra, Commissioner, Fed. Trade Comm’n, Statement Regarding the Request for Comment on Vertical Merger Guidelines, (Jan. 10, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1561727/p810034chopravmgabstain.pdf](https://www.ftc.gov/system/files/documents/public_statements/1561727/p810034chopravmgabstain.pdf) (“The 1984 Non-Horizontal Merger Guidelines should be rescinded, as they represent an antiquated, narrow, and overly permissive mode of thinking that is not reflective of today’s economy or the current approach to enforcement.”).

<sup>23</sup> FTC 90TH ANNIVERSARY SYMPOSIUM, A CONVERSATION WITH TIM MURIS AND BOB PITOFSKY 172, (Sept. 22, 2004), [https://www.ftc.gov/sites/default/files/documents/public\\_events/ftc-90th-anniversary-symposium/040922transcript003.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/ftc-90th-anniversary-symposium/040922transcript003.pdf) (“On the other hand, my guiding principle in deciding which challenges to initiate was to ignore the vertical merger guidelines. They are hopelessly out of date, and they ought to be revisited.”).

<sup>24</sup> Edward M. Kennedy, *Airline Regulation by the Civil Aeronautics Boards*, 41 J. OF AIR L. AND COM. 607, 608 (“The Board’s practices ... have not been effective in maintaining low prices. It is economically and technologically possible to provide present air service at significantly lower prices, bringing air travel within the reach of the average American citizen.”).

<sup>25</sup> Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF’T 10, 12-13 (2019),

Both the CAB and the ICC were ultimately disbanded by Congress with bipartisan support. (Indeed, now-President Joseph Biden, at the time a Senator from Delaware, voted to deregulate these industries and did not oppose disbanding these regulatory behemoths.)<sup>26</sup> The dissolution of these regulatory frameworks brought immediate benefits. When the CAB was disbanded, studies estimated that the increased competition stemming from deregulation provided \$14.9 billion in annual benefits.<sup>27</sup>

Despite these failures, proponents of rulemaking still yearn for the days of the ICC and CAB regulating competition. Tim Wu, after praising some efforts to removed barriers imposed by the CAB, proceeds to question the long-term procompetitive impact of this deregulation.<sup>28</sup> And the House Judiciary Committee’s Majority Staff Report points to railroad regulation as a model for Big Tech.<sup>29</sup> In a stunning omission, nowhere in the 450 pages or 2,543 footnotes does the report mention the fact of the ICC’s bipartisan repeal or the benefits that came from deregulation.<sup>30</sup> As the saying goes, if you do not acknowledge the mistakes of the past, you are doomed to repeat them.

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<https://academic.oup.com/antitrust/article/8/1/10/5614371> (citing a background paper prepared at the request of the Brookings Institution for a conference held in 1967) (internal quotations omitted).

<sup>26</sup> See, e.g., S. Vote 763 to Pass S. 2493, GOVTRACK (Apr. 19, 1978), <https://www.govtrack.us/congress/votes/95-1978/s763> (voting to approve the Airline Deregulation Act phasing out the Civil Aeronautics Board’s powers); S. Vote 580 to Pass S. 1946, GOVTRACK (Apr. 1, 1980), <https://www.govtrack.us/congress/votes/96-1980/s580> (voting to approve the Staggers Rail Act significantly deregulating the railroad industry). Biden was also a member of the Senate during the two voice votes that terminated the Civil Aeronautics Board and the Interstate Commerce Commission. See H.R. 2539 (104th): ICC Termination Act of 1995, GOVTRACK, <https://www.govtrack.us/congress/bills/104/hr2539>; H.R. 5297 (98th): Civil Aeronautics Board Sunset Act of 1984, GOVTRACK, <https://www.govtrack.us/congress/bills/98/hr5297>.

<sup>27</sup> Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH L. J. 33, 35 (2005), <https://ctlj.colorado.edu/wp-content/uploads/2018/03/3-Wu-1.22.18-FINAL.pdf> (citing Steven A. Morrison & Clifford Winston, *Airline Deregulation and Public Policy*, 245 SCIENCE 707, 708 (1989) (finding that increased competition stemming from deregulation had provided travelers and carriers with \$14.9 billion of annual benefits)).

<sup>28</sup> *Id.* at 40 (“The longer-term assessment has been more mixed, particularly after the major airlines consolidated into a small number of firms and displayed signs of oppressive oligopoly practices, such as coordinated pricing and degraded customer service”).

<sup>29</sup> See MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 7 (2020), [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf) at 380 (“In the railroad industry, for example, a congressional investigation found that the expansion of common carrier railroads into the coal market undermined independent coal producers, whose wares the railroads would deprioritize in order to give themselves superior access to markets. In 1893, the Committee on Interstate and Foreign Commerce wrote that ‘[n]o competition can exist between two producers of a commodity when one of them has the power to prescribe both the price and output of the other.’ Congress subsequently enacted a provision to prohibit railroads from transporting any goods that they had produced or in which they held an interest.”); *id.* at 382 (“The 1887 Interstate Commerce Act, for example, prohibited discriminatory treatment by railroads.”); *id.* at 383 (“Historically, Congress has implemented nondiscrimination requirements in a variety of markets. With railroads, the Interstate Commerce Commission oversaw obligations and prohibitions applied to railroads designated as common carriers”).

<sup>30</sup> *Id.* See also Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF’T 10, 12-14 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371> (discussing the benefits from dissolving the ICC).

#### 4. Attempts to Narrowly Define Rules are in Vain

Some proponents of rulemaking suggest that past regulatory failures can be corrected by better identifying “obviously” separate products and services.<sup>31</sup> Tim Wu proposes to “correctly” identify separate markets when creating a “clean-cut” for regulation in vertical markets.<sup>32</sup> But it is highly unlikely that this surgical approach will work in practice.

This approach is subject to the same mistakes that ruined past attempts at competition regulation. The ICC’s regulation of railroads, for example, notoriously failed to account for technological change.<sup>33</sup> As new forms of transportation began to compete with railroads, the ICC’s jurisdiction expanded to other forms of transportation, including trucks, barges, and pipelines.<sup>34</sup> Then, due to conflicting regulatory missions, the ICC refused to allow railroads to lower prices because more competitive railroads would harm other industries.<sup>35</sup> Ultimately, consumers were deprived of competition and choice while inefficient competitors were protected.

Some rulemaking advocates acknowledge that past regulatory frameworks have inhibited competition to the detriment of consumers.<sup>36</sup> Two authors of the Furman Report for the UK told me that I should not dwell on past failings, though, because “we are going to do it smartly this time.” This statement is laden with both hubris and a baseless optimism that we have somehow gotten better at predicting the future.

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<sup>31</sup> Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L. J. 33, 52 (2005), <https://ctlj.colorado.edu/wp-content/uploads/2018/03/3-Wu-1.22.18-FINAL.pdf> (“The tiebreakers that have been most successful make a cut between two things that are identifiably or obviously separate products and services, whether by tradition, or based on the physical properties of the products or services involved.”).

<sup>32</sup> *Id.* at 61 (“If the goal is opening a market through a separation rule, a clean cut that yields a real market is desirable[.]”).

<sup>33</sup> Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF’T 10, 26 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371> (“As the ICC’s expanding jurisdiction illustrates, mission creep—often driven by technological change—only exacerbates these problems. In the ICC context, the framers of the original 1887 Act thought their commandment of ‘just’ and nondiscriminatory rates would be straightforward.”).

<sup>34</sup> *Id.* at 16 (“And when new forms of transportation began to compete with the railroads, Congress granted the ICC the authority to regulate most of them, as well. Over time, the ICC acquired jurisdiction over many other forms of transportation, from trucking and barge traffic to natural gas pipelines, leading to conflicting priorities.”) (internal citations omitted).

<sup>35</sup> *Id.* at 18 (“[I]n 1965, two railroads lowered their rate for shipping steel between Pittsburgh and a downstream factory in Kentucky to match the competing rate charged by barges and trucks. In a proceeding called the Ingot Molds decision, the ICC disallowed the rate as too low to both cover its costs and produce what the ICC believed to be a ‘fair’ profit.<sup>55</sup> The Supreme Court affirmed the ICC’s Order. Remarkably, it also commended the ICC for ‘properly’ avoiding ‘a rate war’ because the competing barge-truck rate was not ‘in need of being driven down by competitive pressure’.”) (internal citations omitted).

<sup>36</sup> *See, e.g.*, Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L. J. 33, 61 (2005), <https://ctlj.colorado.edu/wp-content/uploads/2018/03/3-Wu-1.22.18-FINAL.pdf> (“There is much potential, but also possible perils in any usage of rules to pursue the goals of antitrust. ... [I]f the track-record of the last several decades suggests anything, it is that not all such schemes succeed”).



## 5. Rulemaking Inhibits Innovation

For a variety of reasons, regulations risk inhibiting innovation. Some of this detrimental effect flows from the time-consuming nature of rulemaking. Take, for example, the FTC's Care Labeling Rule that specifies which care instructions can be placed on garment labels.<sup>37</sup> Industry associations continually develop new types of care instructions for both existing and new types of fabrics.<sup>38</sup> But the FTC is woefully out of date in updating the rule, so several years of care instructions adopted by the industry are not recognized by the FTC's rule.<sup>39</sup> Even more notably, the FTC does not acknowledge the existence of an emerging rival to dry cleaners known as wet cleaners.<sup>40</sup> Due to lack of visibility, consumers do not know about and cannot demand clothes with this form of cleaning technology.<sup>41</sup> The FTC is effectively inhibiting innovation and blocking competition that would benefit consumers and the environment.

When required to update rules, the FTC has at times failed to revise rules to implement common sense reforms. When updating the Energy Labeling Rule to conform with Department of Energy changes, the FTC received comments explaining that changes in consumer behavior indicate that affixed labels have ceased to provide benefits to consumers. Instead, providing the labeling information online or through QR codes would make it easier to access information in the digital era.<sup>42</sup> But, despite my urging, the FTC chose only to revise the rule to the degree necessary to conform with Department of Energy changes.<sup>43</sup>

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<sup>37</sup> FED. TRADE COMM'N, *Clothes Captioning: Complying with the Care Labeling Rule*, <https://www.ftc.gov/tips-advice/business-center/guidance/clothes-captioning-complying-care-labeling-rule>.

<sup>38</sup> Trade Regulation Rule on Care Labeling of Textile Wearing Apparel and Certain Piece Goods: Supplemental notice of proposed rulemaking, 85 Fed. Reg. 44,485, 44,490 (July 23, 2020), <https://www.federalregister.gov/documents/2020/07/23/2020-13919/trade-regulation-rule-on-care-labeling-of-textile-wearing-apparel-and-certain-piece-goods> (“To the extent that current mandated labels may be imperfect or limited, a benefit of the Rule’s repeal would be to afford manufacturers and sellers the freedom to improve existing labels, to label new cleaning methods as they enter the market, and to use widely recognized care symbol systems without waiting for updates to the Rule.”).

<sup>39</sup> *Id.* at 44,485-86 (July 23, 2020) (following multiple periods of comments and a roundtable in March 2014 and finding “the record suggests that the Rule may not be necessary to ensure manufacturers provide care instructions, may have failed to keep up with a dynamic marketplace, and may negatively affect the development of new technologies and disclosures.”).

<sup>40</sup> *Id.* at 44,491 (“Repeal would also eliminate any possibility the Rule negatively affects market innovation. Over the course of the proceeding, some commenters suggested that the Rule might have had a negative impact on the adoption of new cleaning technologies. For example, commenters and workshop participants explained that the Rule’s failure to address wetcleaning has placed professional wetcleaners at a competitive disadvantage and discouraged greater use of that technology.”)

<sup>41</sup> *Id.* at 44,488 (“As noted earlier, some commenters presented evidence that many consumers would prefer wetcleaning if they knew of the option and the quality and cost were comparable.”).

<sup>42</sup> Dissenting Statement of Commissioner Christine S. Wilson Notice of Proposed Rulemaking for the Energy Labeling Rule (December 22, 2020) at 1, [https://www.ftc.gov/system/files/documents/public\\_statements/1585242/commission\\_wilson\\_dissenting\\_statement\\_energy\\_labeling\\_rule\\_final12-22-2020revd2.pdf](https://www.ftc.gov/system/files/documents/public_statements/1585242/commission_wilson_dissenting_statement_energy_labeling_rule_final12-22-2020revd2.pdf).

<sup>43</sup> *Id.*

Mission creep and regulatory capture provide another explanation for diminished innovation. When the regulated railroads developed new rail cars that could be operated more cheaply, they petitioned the ICC to lower their prices.<sup>44</sup> But the ICC wanted to protect rival trucking and barges from losing too much business, so it said no.<sup>45</sup> Only after the ICC was disbanded did these new rail cars get used in abundance.<sup>46</sup>

Finally, we can learn an important lesson from the EU's data privacy rule, known as General Data Protection Regulation (GDPR). The GDPR allows a company to process personal data in six specifically identified circumstances.<sup>47</sup> In the U.S., privacy laws typically forbid certain types of harmful data usage, but otherwise allow what is called "permissionless innovation."<sup>48</sup> Many commentators believe this diametrically opposed mindset explains the dominance of the United States in the tech sector.<sup>49</sup>

## 6. Rulemaking is Not a Democratic Alternative to Adjudication

Proponents of competition rules assert that the rulemaking process is more democratic than adjudication,<sup>50</sup> but this is a false dichotomy. On issues as fundamental as competition rules in a free market society, it is the legislative process that should be compared to rulemaking. The

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<sup>44</sup> Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF'T 10, 18 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 19.

<sup>47</sup> EUROPEAN COMMISSION, *When can personal data be processed?* [https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/grounds-processing/when-can-personal-data-be-processed\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/grounds-processing/when-can-personal-data-be-processed_en).

<sup>48</sup> See generally Adam Thierer, *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom*, MERCATUS CENTER (2014), <https://www.mercatus.org/system/files/Thierer-Permissionless-revised.pdf>.

<sup>49</sup> See, e.g., Adam D. Thierer, *Embracing a Culture of Permissionless Innovation*, CATO ONLINE FORUM (Nov. 17, 2014), <https://www.cato.org/cato-online-forum/embracing-culture-permissionless-innovation> ("Consider how permissionless innovation powered the explosive growth of the Internet and America's information technology sectors (computing, software, Internet services, etc.) over the past two decades. Those sectors have ushered in a generation of innovations and innovators that are now the envy of the world. This happened because the default position for the digital economy was permissionless innovation. No one had to ask anyone for the right to develop these new technologies and platforms.").

<sup>50</sup> Letter from Rohit Chopra, Commissioner, Fed. Trade Comm'n, to Makan Delrahim, Assistant Attorney General, U.S. Dept. of Justice Antitrust Division (September 18, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1544564/chopra\\_-\\_letter\\_to\\_doj\\_on\\_labor\\_market\\_competition.pdf](https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf) ("A rulemaking proceeding that defines when a non-compete clause is unlawful is far superior than case-by-case adjudication. The proceeding would allow a broad array of stakeholders, not just a plaintiff and a defendant, to contribute to the development of the law."); ("Lastly, in many respects, the status quo lacks adequate democratic participation. The almost singular reliance on case-by-case adjudication leaves broad swaths of market participants watching from the sidelines, lacking an opportunity to contribute their perspective, their analysis, or their expertise, except through one-off amicus briefs.").

elected legislatures are better suited to make these policy decisions, not three unelected Commissioners of an independent federal agency.

In any event, rulemaking does not escape interest group influence, which further undermines any democratic justifications for agency rulemaking. Empirical research shows that ex parte communications from special interest groups play a significant role in shaping the rules that get proposed in ANPRMs and NPRMs.<sup>51</sup> Legislatures, of course, are also subject to the influence of lobbyists. But legislatures are elected and therefore ultimately answer to their constituents in response to important policy decisions.

Finally, any assertion by the current majority of the Commission that rulemakings facilitate democratic participation ring hollow. On a 3-2 vote with no opportunity for public comment, the majority rammed through changes to the agency's Rules of Practice that actually limit public participation in and decrease the transparency of rulemaking proceedings, while facilitating an agenda-driven process susceptible to bias.<sup>52</sup> It is ironic that this majority claims to seek more rulemaking to enhance democratic participation in the governing process.

## 7. Competition Rulemaking Places the FTC in a Historically Damaging Position

The FTC gets punished by courts and Congress when it pushes the boundaries of its authority to the detriment of consumers. For example, despite having rulemaking power since its creation in 1914, the FTC issued few rules until the 1960's.<sup>53</sup> The FTC then accelerated its rulemaking,<sup>54</sup> and in 1973, the D.C. Circuit affirmed that the FTC had substantive rulemaking powers.<sup>55</sup> Congress stepped in only two years later, passing the Magnuson-Moss Act, which gave the FTC substantive consumer protection rulemaking power, but implemented increased

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<sup>51</sup> Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking during Agency Rulemaking*, 22 J. PUB. ADMIN. RSCH. AND THEORY 373 (2011), <https://academic.oup.com/jpart/article/22/2/373/914299>.

<sup>52</sup> Dissenting Statement of Commissioner Christine S. Wilson Open Commission Meeting on July 1, 2021 (July 1, 2021) at 3-7, [https://www.ftc.gov/system/files/documents/public\\_statements/1591554/p210100wilsoncommnmeetingdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf).

<sup>53</sup> Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1860 (2015), [https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1835.pdf?\\_sm\\_pdc=1&\\_sm\\_rid=kTMT5MZQDfZ7snWVV5MjRjZDk57QnT5MN6TVsZN](https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1835.pdf?_sm_pdc=1&_sm_rid=kTMT5MZQDfZ7snWVV5MjRjZDk57QnT5MN6TVsZN); Barry B. Boyer, *Executive Summary of Barry B. Boyer Report, Trade Regulation Rulemaking Procedures of the Federal Trade Commission, Report in Support of ACUS Recommendation 79-1*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 41, 43 (1979) (“[T]he statutory standard governing the FTC’s consumer protection activity provided few real limits.... As a result, the feeling was apparently widespread among the members of the congressional committees considering the Magnuson-Moss Act that some means had to be found to control this broad discretion. The limits which Congress considered and ultimately enacted were predominantly procedural rather than substantive; the broad rulemaking delegation was retained, but the procedures for promulgating the rules were elaborated and formalized.”).

<sup>54</sup> *Id.* See also SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L. J. 43, 88 (1989).

<sup>55</sup> *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 697-98 (D.C. Cir. 1973) (analyzing a rule promulgated under the FTC’s consumer protection and competition authority).

procedural hurdles.<sup>56</sup> The Commission continued to create rules, leading the Washington Post to label the FTC a “national nanny” in March 1978<sup>57</sup> and leading Congress to act—again—by passing the Federal Trade Commission Improvements Act of 1980 that implemented more safeguards in the FTC’s rulemaking process.<sup>58</sup>

The Commission was recently reprimanded for acting outside our Congressional authority. In the *AMG* case decided earlier this year, the Supreme Court unanimously ruled that the Commission has exceeded its authority to seek monetary relief under Section 13(b) of the FTC Act.<sup>59</sup> Consistent with decades of federal district court and court of appeals decisions, I support the FTC’s use of Section 13(b) to seek equitable monetary relief in appropriate cases, and also to challenge conduct that wrongdoers have halted,<sup>60</sup> but we cannot ignore the Supreme Court’s recent admonition that we have overstepped our Congressionally mandated boundaries. I am puzzled about why the Commission would take the risk of promulgating competition rules based on even more tenuous authority so soon after a reprimand from the highest court in the land.

But there is even more at stake. Questions have been raised about the wisdom of having two different federal antitrust enforcement agencies, in part because of the danger that the two agencies may apply different standards.<sup>61</sup> Even the *appearance* of different standards

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<sup>56</sup> Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1860 (2015), [https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1835.pdf?\\_sm\\_pdc=1&\\_sm\\_rid=kTMT5MZQDfZ7snWVV5MjRJZDk57QnT5MN6TVsZN](https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1835.pdf?_sm_pdc=1&_sm_rid=kTMT5MZQDfZ7snWVV5MjRJZDk57QnT5MN6TVsZN).

<sup>57</sup> *The FTC as National Nanny*, WASH. POST (Mar. 1, 1978), [https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/?noredirect=on&utm\\_term=.5e02c4575a42](https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/?noredirect=on&utm_term=.5e02c4575a42)

<sup>58</sup> See Alex Propes, *Privacy & FTC Rulemaking Authority: A Historical Context*, IAB (Nov. 6, 2018), <https://www.iab.com/news/privacy-ftc-rulemaking-authority-a-historical-context>. See also Jeffrey S. Lubbers, *It’s Time to Remove the ‘Mossified’ Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1989 (2015), [https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch\\_lawrev](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch_lawrev) (discussing the difficulty and rarity of FTC rulemaking after 1980).

<sup>59</sup> *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341, 1350-51 (2021).

<sup>60</sup> Christine S. Wilson, Commissioner, Fed. Trade Comm’n, Oral Statement Before the U.S. Senate Comm. on Commerce, Sci. and Transp. (Apr. 20, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1589180/opening\\_statement\\_final\\_for\\_postingrevd.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf). (“The bottom line is that the legitimate concerns of stakeholders can be addressed while also restoring the ability of the FTC to use Section 13(b) to pursue wrongdoers.”). See also Letter from Fed. Trade Comm’n to U.S. House of Representatives Comm. on Energy and Commerce and U.S. Senate Comm. on Commerce, Sci., and Transp. (Oct. 22, 2020).

<sup>61</sup> Ryan Young & Alex Reinauer, *Are Two Federal Agencies Smarter Than One to File Antitrust Lawsuits?*, THE HILL (Jan. 4, 2021), <https://thehill.com/opinion/judiciary/532546-are-two-federal-agencies-smarter-than-one-to-file-antitrust-lawsuits> (“There is no reason for two separate federal agencies and state officials to all have antitrust authority with no clear division of labor. While antitrust law is fatally flawed, it is not likely going away any time soon. At the very least, it should be simplified. Senator Mike Lee has introduced two bills that are the first steps in that direction. He should reintroduce them so Congress can pass them in the new session. One bill is the Standard Merger and Acquisition Reviews Through Equal Rules Act, better known as the Smarter Act. It would require the Justice Department and the Federal Trade Commission to follow a single uniform interpretation of the Clayton Act,

undermines faith in good government. And in part to address this problem of differing standards, members of Congress have discussed transferring the FTC’s competition authority to DOJ.<sup>62</sup> These different standards will be exacerbated by FTC rulemaking initiatives, particularly because the Antitrust Division of the Department of Justice cannot be bound by FTC rules.<sup>63</sup>

Of course, some proponents of rulemaking purposefully wish to extend antitrust enforcement beyond DOJ’s jurisdiction and precedent under the Sherman Act.<sup>64</sup> In a world of concurrent federal antitrust jurisdiction, how will divergent standards be applied to industries typically reviewed by the DOJ rather than the FTC? Law-abiding businesses will lack clarity about the legality of conduct treated differently by the two agencies. Moreover, good government and effective use of taxpayer dollars will decline because arguments about which of the two federal antitrust agencies will review a suspect merger or business practice – known colloquially as “clearance disputes” – can only be expected to intensify. For these reasons, proceeding down the path of FTC competition rulemaking could be the straw that breaks the camel’s back of our dual-agency system.

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Time is limited, so these seven reasons provide just a starting point for the discussion of why competition rules will be a fool’s errand – and for the FTC, maybe even institutional suicide. I look forward to continuing this dialogue with all of you in the coming weeks and months.

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which governs merger cases. Right now, the agencies can use different interpretations as suits their political needs, confusing both judges and defendants alike.”).

<sup>62</sup> See One Agency Act, S. 633, 117th Cong. § 4 (2021). See also The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), <https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-The-House-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf> (“The current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.”).

<sup>63</sup> Daniel A. Crane, *Technocracy and Antitrust* 44-45 (Cardozo Legal Studies Research Paper No. 208, 2007) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1030632](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1030632). See also Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 841 (2006), <https://scholarship.law.wm.edu/wmlr/vol48/iss3/2> (discussing rulemaking in the merger context and stating that because “the two agencies are jointly responsible for enforcement of the Clayton Act, given their institutional history the FTC would not likely issue binding rules that the DOJ would not be bound to follow”).

<sup>64</sup> Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 370-71 (2020), [https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan\\_Rulemaking\\_87UCLR357.pdf](https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf).